Likra, Inc. d/b/a Mapleview Nursing Home *and* Local 285, Service Employees International Union, AFL–CIO, CLC. Case 1–CA–30470

May 7, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On July 31, 1995, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions with a supporting brief, and the General Counsel filed a cross-exception and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified.

1. The judge found that the Respondent violated the Act by: (1) announcing to the Union on April 26, 1993,[1] that it had already put in place, effective April 1, a new health insurance plan with a new carrier and increased employee premiums; and (2) on June 1, unilaterally implementing a two-tier insurance plan under which new hires would pay increased premiums.

The remedy and Order of the judge's decision treat the Respondent's April 1 unilateral implementation of a change in insurance carriers as a violation of the Act. The General Counsel, however, did not allege this change as a violation of the Act, either in the original complaint or in the complaint as amended at the start of the hearing. Moreover, we note that the Union had amended its unfair labor practice charge to *delete* any reference to the change in carriers. Thus, we find that this aspect of the remedy and Order are unsupported and we will modify them accordingly. See *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992) (dismissing violations found by the judge but not alleged in the original or amended complaint), enfd. 25 F.3d 473 (7th Cir. 1994), cert. denied 115 S.Ct. 729 (1995); *WXON-TV*, 289 NLRB 615, 616–617 (1988) (deleting from order the judge's finding of violation as to conduct neither alleged in complaint nor contended at hearing or in posthearing brief to be unlawful), enfd. 876 F.2d 105 (6th Cir. 1989).

2. We also reverse the judge's finding that the Respondent violated the Act by announcing to the Union on April 26 that it had unilaterally changed insurance carriers and increased the employees' insurance premiums. The announcement regarding the change in carriers, like the change in carriers itself, was not alleged in the charge (as amended), the complaint, or the amended complaint, and therefore is not properly the subject of an unfair labor practice finding. As to the announcement regarding an increase in insurance premiums, we find that the record does not support the judge's factual finding that the Union was told at the April 26 meeting that the Respondent had already instituted the change in insurance premiums. We therefore will delete the pertinent paragraph from the judge's conclusions of law and modify the Order and notice accordingly.[2]

AMENDED CONCLUSION OF LAW

Delete the paragraph marked as paragraph 3 and beginning with the words: ''Respondent violated . . . .''[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Likra, Inc. d/b/a Mapleview Nursing Home, Washington, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the first sentence of paragraph 1(a).

''(a) Since about June 1, 1993, and continuing to date, unilaterally increasing the insurance premium payments for newly hired employees in the below-described unit, without giving prior notice and an opportunity to bargain to the Union.''

2. Substitute the following for paragraphs 2(a) and (b).

''(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning their terms and conditions of employment; in particular, any changes to the unit employees' insurance premium payments, until agreement or impasse is reached and, if there is an understanding, embody it in a signed agreement.

''(b) At the Union's request, rescind the unilateral changes in certain unit employees' health insurance premium payments implemented on June 1, 1993, and make the affected employees whole for any losses they may have incurred by virtue of such changes until it bargains in good faith with the Union or until reaching agreement or impasse.''

[1] All dates refer to 1993 unless otherwise indicated.

[2] We find it unnecessary to pass on whether an announcement made to the employees on April 1 regarding an increase in insurance premiums violated the Act, for the judge did not find this to be a violation and there was no exception to her failure to make such a finding.

[3] The judge inadvertently marked two paragraphs as par. 3 in her conclusions of law.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain in good faith with Local 285, Service Employees International Union, AFL–CIO, CLC as the exclusive bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time service and maintenance employees, including nursing assistants, restorative aides, activities assistants, laundry aides, housekeepers, dietary aides, cooks and maintenance employees employed by us at our Lover's Lane Road, Washington, Massachusetts facility, but excluding office clerical employees, licensed practical nurses, registered nurses, social workers, professional . . . managerial . . . confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT, without prior notice to and bargaining with the Union, change any existing term or condition of employment for bargaining unit employees by increasing employee contributions to their health insurance plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL, on the Union's request, bargain with it as the exclusive representative of our employees in the above-described unit, about any proposed changes in their health insurance premiums, and any other terms and conditions of employment and, if agreement is reached, WE WILL embody such agreement in a signed contract.

WE WILL, at the Union's request, rescind the unilateral increases in employee contributions to health insurance premiums that we announced and implemented on June 1, 1993.

WE WILL make affected employees whole for any losses they may have incurred by reason of our unilateral increases in employee contributions to health insurance premiums, with interest.

LIKRA, INC. D/B/A MAPLEVIEW NURSING HOME

Elizabeth A. Vorro, Esq., for the General Counsel.
Stuart Bochner, Esq. (Horowik & Pollock), of South Orange, New Jersey, for the Respondent.
Eric C. Stuart, Esq. (Peckar & Abramson), of River Edge, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Upon a charge filed on May 7, 1993,[1] and amended on June 4, by Local 285, Service Employees International Union, AFL–CIO, CLC, a complaint issued on June 21, alleging that the Respondent, Likra, Inc. d/b/a Mapleview Nursing Home violated Section 8(a)(1) and 5) of the National Labor Relations Act by announcing that changes in the employees' health insurance plan were implemented and announcing and implementing other changes without affording notice or an opportunity to bargain to the Union. The Respondent filed a timely answer denying the substantive allegations.

The case was tried in Pittsfield, Massachusetts, on April 13, 1994, at which time the parties examined witnesses, presented documentary evidence, and had the opportunity to examine and cross-examine witnesses, present documentary evidence, and argue orally. On the evidence presented in this proceeding, and my observation of the witnesses' demeanor, and after consideration of the General Counsel's and Respondent's posttrial briefs, I reach the following

FINDINGS OF FACT

A. *Jurisdiction*

The complaint alleges, and Respondent Likra did not deny, that it is a corporation with an office and place of business in Washington, Massachusetts, which has at all material times, been engaged in operating a nursing home. Annually, at all material times, in conducting its afore-described business, Respondent derived gross revenues in excess of $100,000. Respondent also purchases and receives at its Washington location goods and materials valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

B. *Alleged Unfair Labor Practices*

1. Respondent's purchase of Mapleview

At the hearing in this proceeding, the parties stipulated that Respondent purchased the assets of Mapleview from its predecessor, Health Care and Retirement Corporation (HCR) on March 1, 1993, and operated the nursing home from that

[1] Unless otherwise noted, all events took place in 1993.

date forward without interruption of services.[2] Respondent retained almost all of the former HCR employees without requiring them to reapply and maintained the same terms and conditions of employment that prevailed under the predecessor. Accordingly, the parties further stipulated that Respondent is a successor employer which assumed HCR's bargaining obligations.

In addition to Mapleview, Respondent purchased four other nursing homes from HCR. Local 285 represented the service and maintenance employees at four of these facilities and had collective-bargaining agreements in place at two of them. Although the Union was certified as the collective-bargaining agent for the Mapleview employees a year before the acquisition, a labor contract had not yet been executed.

On February 17, a month before the sale, union representatives for each of the four nursing homes met with Respondent's president, Michael Koenig, and other management personnel and posed several requests. First, the Union asked to negotiate a single contract for all four homes; second, that the same terms and conditions of employment recently secured for employees at one of the facilities be applied to the Mapleview unit. Koenig promised to consider these requests.[3]

2. Respondent introduces health insurance rate increase

When employed by HCR, unit members could opt to have health insurance coverage through their employer with premiums deducted from their wages under a plan provided by Aetna. Insofar as the employees knew, Respondent maintained the same plan for approximately a month and a half following its March 1 takeover. However, in early to mid-April, Respondent distributed materials to unit members which indicated that a new policy with steeply increased premiums under a different provider, Great West, had been implemented as of April 1.[4]

[2] Respondent asserts in its brief that HCR still operated Mapleview at the end of March, relying on an employee's testimony that the former HCR administrator posted a notice at that time. Respondent apparently forgets that it stipulated that it began operating the nursing home as of March 1. In light of this stipulation, I assume that the employee erred in referring to the wrong month.

[3] By meeting with Local 285's bargaining agents on February 17 and agreeing to consider their proposals, it is fair to conclude that Respondent tacitly recognized the Union on that date.

[4] The parties stipulated that the new premiums would increase as follows:

Weekly Cost Per Person	*Old Plan (Aetna)*	*New Plan (Great West)*
Single coverage	—	$13.36
Family coverage		
employed less than 1 year	$24.82	60.92
employed 1–2 years	18.62	45.69
employed 3–5 years	12.41	30.46
employed 6 or more years	6.21	15.23

Respondent failed to notify the Local in advance of the changed health insurance coverage. In fact, the parties did not discuss the matter until April 26[5] when Michael Koenig and other management officials met with Union Agent Leslie Lomasson and representatives of the other organized facilities.

Lomasson testified without controversion that during what she described as an informational meeting, Koenig explained that a new plan under a different carrier had been instituted as of April 1 which he hoped the Union would approve retroactively. He said nothing about implementing changes in the premium payments employees might be required to contribute in the future.

In response to Lomasson's inquiry, Respondent's manager, Myra Rivera, who participated in the meeting by telephone, quoted premium rates which matched those previously given to the employees. Although Lomasson told Koenig that the Respondent was obligated to bargain about the matter, the parties reached no agreement. Lomasson left the meeting believing that Respondent already had implemented the changes.

3. Respondent introduces two-tiered health insurance plan

According to bargaining unit member Reeves, when Koenig held his first staff meeting early in May and assured the assembled employees that although ''the insurance had changed the policies and procedures would stay the same.'' (Tr. 26.) However, some weeks later, a memo dated June 1 came to Reeves' attention in which Respondent described a two-tiered health system to be implemented as of that date. Specifically, the memo stated that the same rates would continue to apply for employees hired before April 1, while employees hired after that date would be subject to increased rates.

The parties stipulated that Respondent had not discussed a two-tiered system with bargaining unit employees or union agents before this memo was circulated. Lomasson added that she learned that insurance rates for employees hired prior to April 1 had not increased only a week before trial in this matter.[6]

DISCUSSION

A. *Issues*

The foregoing facts give rise to the following issues:

1. Whether Respondent initially assumed the predecessor's terms and conditions of employment.

2. Whether the Union waived its right to bargain over Respondent's announced changes in the unit employees' health insurance coverage.

3. Whether Respondent violated the Act by unilaterally implementing a two-tiered health insurance payroll deduction plan.

[5] Respondent's objection on hearsay grounds to testimony by the union agent that a colleague told her in mid-April about the new health insurance policy was granted. Accordingly, Respondent's attempt in its brief to rely on testimony which it successfully excluded at the hearing cannot be countenanced.

[6] Lomasson left the Union's employ in July.

B. *Analysis*

1. Respondent was not free to alter predecessor's terms and conditions of employment without bargaining

Ordinarily, a successor is free to set initial terms on which it will hire the predecessor's employees. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). However, the successor must announce ''new terms prior to or simultaneous with . . . the offer of employment.'' If such an announcement is not forthcoming, the successor is obliged to maintain the status quo whether or not a collective-bargaining agreement is in place. Where there is no agreement, the terms and conditions are those established by the predecessor's past practices. See *Blitz Maintenance*, 297 NLRB 1005, 1008 (1990), enfd. 919 F.2d 141 (6th Cir. 1990).

In the instant case, Respondent neither announced nor implemented changes in any terms or conditions of employment for a month after it began operating Mapleview. To the contrary, employees were notified that they would continue to work ''as before.''[7] Not until April 15, a month and half after the purchase, did employees learn that Respondent intended to alter their health insurance policy. Having failed to alert the work force and the Union at the outset that changes were in the offing, Respondent forfeited the opportunity to do so without first notifying and providing the Union an opportunity to bargain before a proposed change could be implemented. See *Starco Farmers Market*, 237 NLRB 373 (1978).

2. The Union did not waive its right to bargain

The General Counsel contends that Respondent misled the Union into believing that the insurance rates were changed early in April. Therefore, the Government submits that since Respondent presented this change as a fait accompli, thereby creating the impression that negotiations would be futile, it cannot be said that the Union waived its bargaining rights.

Respondent counters that it told the Union about a *proposed* change in the employees' health insurance coverage, not one which was already implemented. (Emphasis added.) Consequently, Respondent insists that the Union waived whatever rights it might have had by failing to request bargaining about the new insurance plan with ''due diligence.'' *W-l Forest Products Co.*, 304 NLRB 957, 960–961 (1991).

To determine whether an employer has presented a union with a fait accompli, the Board looks for objective evidence. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). More than enough objective evidence was presented in this case to prove that the Respondent presented the Union with what appeared to be a fait accompli. According to Union Agent Lomasson's uncontroverted testimony, on April 26, the announcement that increased employee contributions under a new health insurance plan already were installed, came from the highest authority—Respondent's president, Koenig. Neither he nor any other witness for the Respondent attempted to contest Lomasson's testimony that at the April 26 meeting, he sought retroactive approval from the Union for the increased premium payments. Obviously, retroactive endorsement is sought where actions have been taken; not where they are merely proposed for the future. Moreover, Respondent reinforced the notion that the changes were a fait accompli when in answering Lomasson's questions, Myra Rivera confirmed that the new plan had been implemented. Another Government witness, unit employee Reeves corroborated Lomasson's testimony by stating that she, too, was led to believe that new higher premium contributions were instituted as of early April, leading her to transfer to a different health plan. She did not learn that the premiums would remain the same for employees hired prior to April 1 until she received a memo dated June 1. In short, Lomasson's understanding that sharply increased payments for health insurance coverage were required as of April 1 was based on multiple, uncontested, and objective sources.

Respondent contends that since the rates for employees hired prior to April 1 were not altered in fact, the Union bore the burden of testing its willingness to bargain and failed to do so. However, in *South Carolina Baptist Ministries*, 310 NLRB 156, 189 (1993), the Board agreed with the administrative law judge, contrary to the Respondent's contention, that notice of a unilaterally implemented change in a mandatory term of employment constitutes an unfair labor practice even if no change actually was implemented. Having given notice of a change which it indicated was in place at the beginning of the month, Respondent relieved the Union of its duty to request bargaining. Far from waiving its bargaining rights, Lomasson reminded Koenig of Respondent's duty to bargain, but to no avail. In the final analysis, Respondent was guilty of committing an unfair labor practice when at an April 26 meeting with the Union, it announced that a health insurance plan was in place with a new provider and increased premium contributions, seeking approval for its act *nunc pro tunc*.

3. Respondent unlawfully implemented a two-tiered insurance system

An employer may reach a decision about a mandatory subject of bargaining before consulting a union representative, but must delay implementing that decision until it has notified and given an opportunity to request bargaining to the Union. *Mercy Hospital*, supra at 873.

On June 1, only a week after the Union alerted Koenig of the Company's duty to bargain about changes in insurance coverage for unit employees. Respondent, without prior notice, informed the work force and, at the same time, implemented a two-tiered health insurance plan with higher rates for those employees hired since April. For the same reasons as set forth above, by unilaterally altering a mandatory subject of bargaining, Respondent again violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Likra, Inc. d/b/a Mapleview Nursing Home, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

[7] Respondent argued in its brief that it was not responsible for posting the notice which read that conditions would ''continue as before,'' since it was posted by the predecessor. Respondent's argument does not hold water since it entered into a stipulation that Likra assumed the management of the nursing home on March 1. Moreover, Respondent never repudiated the message which, in fact, corresponded to its practices after the takeover and, thus, ratified it.

2. Local 285, Service Employees International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about March 1, 1992, the Union has been the exclusive bargaining representative for the following unit:

> All full-time and regular part-time service and maintenance employees, including nursing assistants, restorative aides, activities assistants, laundry aides, housekeepers, dietary aides, cooks and maintenance employees employed by Respondent at its Lover's Lane Road, Washington, Massachusetts facility, but excluding office clerical employees, licensed practical nurses, registered nurses, social workers, professional . . . managerial . . . confidential employees, guards and supervisors as defined in the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act by failing to notify and provide an opportunity to bargain to the Union before announcing on April 26 that it had implemented unilaterally a changed health insurance program with increased premiums for unit employees as of April 1, 1993.

4. Respondent also violated Section 8(a)(1) and (5) of the Act by announcing and unilaterally implementing on June 1, a new health insurance program for all employees hired after April 1.

5. The unfair labor practices described in paragraphs 3 and 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in the above-described unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, at the Union's request, the Respondent shall be directed to rescind any unilateral changes in the unit employees' payments to a company health insurance plan which it did not announce to the Union until April 2, 1993, and, also the change announced and implemented on June 1, 1993. Further, I shall recommend that Respondent make affected employees whole for any losses incurred by virtue of its unilateral changes in their health insurance benefits or any other terms and conditions of employment from March 1, 1993, until such time as it bargains in good faith with the Union about this matter and reaches agreement or impasse. Such payments shall be reimbursed in accordance with *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, I shall recommend that, at the Union's request, Respondent shall bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment, in particular, any changes to the unit employees' health insurance plan and, if an understanding is reached, embody the understanding in a signed agreement. Lastly, Respondent shall be ordered to post the notice attached hereto as an appendix.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Likra, Inc. d/b/a Mapleview Nursing Home, Washington, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Since on or about April 1, 1993, and continuing to date, unilaterally departing from, and/or announcing the departure from, the then prevailing health insurance plan and premium payments for its employees in the below-decribed unit, without granting prior notice and an opportunity to bargain to the Union:

> All full-time and regular part-time service and maintenance employees, including nursing assistants, restorative aides, activities assistants, laundry aides, housekeepers, dietary aides, cooks and maintenance employees employed by Respondent at its Lover's Lane Road, Washington, Massachusetts facility, but excluding office clerical employees, licensed practical nurses, registered nurses, social workers, professional . . . managerial . . . confidential employees, guards and supervisors as defined in the Act.

(b) In any like or related manner intefering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning the terms and conditions of employment; in particular, any changes to the unit employees' health insurance plan and premium payments, until agreement or impasse is reached and, if there is an understanding, embody it in a signed agreement.

(b) At the Union's request, rescind the unilateral changes in the unit employees' terms and conditions of employment, particularly changes in their health insurance plan and premium payments announced as implemented on April 1, 1993, and those announced and implemented on June 1, 1993, and make the affected employees whole for any losses they may have incurred by virtue of such change until it bargains in good faith with the Union until reaching agreement or impasse. The reimbursement of wages shall be computed in the manner described in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Washington, Massachusetts, copies of the attached notice marked ''Appendix.''[9] Copies of

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the

the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''